

Heimdal, Monica

From: John Brunini [jbrunini@brunini.com]
Sent: Thursday, September 19, 2013 9:57 AM
To: Kato, Linda
Cc: Heimdal, Monica; kb@geomap.tv
Subject: Emailing: Revised Consent Agreement with JAB Comments (01635389).DOCX
Attachments: Revised Consent Agreement with JAB Comments (01635389).DOCX

Linda,

Attached to this email, please find a redline version of the proposed Consent Agreement. This redline version contains only minor substantive proposed revisions and includes pertinent contact and signatory information. My client has reviewed the terms of this Consent Agreement and is prepared to execute it if you can get approval on your end. As we have discussed, every day counts if this restoration work can be accomplished before winter weather sets in. I appreciate all you have done to expedite this process and hope that we can continue making progress and begin restoration work very soon. Along those lines, I have contacted Dan Cimarosti with the Corps of Engineers, Bismarck Field Office to ask whether the Corps will require any additional authorization for restoration work to begin. I am waiting to hear back from him. If any approval or authorization is required, we will furnish you and Ms. Heimdal with copies.

Once you have received this draft and reviewed it, please contact me with any questions. If things look acceptable to you, please let me know next steps for obtaining approval of our revised Restoration Plan, proposed Consent Agreement, and obtaining authorization to begin Restoration work.

Thank you very much for all of your help.

JB

John A. Brunini

E: jbrunini@brunini.com
P: 601-973-8712 F: 601-960-6902

The logo for Brunini, featuring the word "BRUNINI" in a bold, serif font, with a stylized arc above the letters.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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IN THE MATTER OF:

BIP 40, LLC
P.O. Box 51568
Casper, WY 82605

Respondent.

ADMINISTRATIVE ORDER
ON CONSENT

Docket No.

I. INTRODUCTION

This Administrative Order on Consent (Consent Order) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and Respondent BIP 40, LLC. The Consent Order concerns the implementation and completion of actions required to restore the environmental damage caused by allegedly illegal discharges of dredged and/or fill material into wetlands adjacent to Camp Creek at the Williston RV Village Resort (the Site) in Williston, Williams County, North Dakota.

II. STATUTORY AUTHORITY

The following FINDINGS are made and ORDER issued pursuant to the authority vested in the Administrator of the EPA by sections 308 and 309 of the Clean Water Act (CWA), 33 U.S.C. §§ 1318 and 1319, and by the Administrator delegated to the Regional Administrator of the EPA Region 8 and redelegated by the Regional Administrator of the EPA Region 8 to the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice. The Consent Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a) which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

III. PARTIES BOUND

This Consent Order shall apply to and be binding upon the EPA and upon Respondent, its officers, directors, agents, successors, and assigns. The signatories to this Consent Order certify that they are authorized to execute and legally bind the party they represent to this Consent Order. No change in the ownership or corporate status of Respondent or of the Site shall alter Respondent's responsibilities under this Consent Order unless the EPA, Respondent, and the transferee agree in writing to allow the transferee to assume such responsibilities. Additionally, at least 30 calendar days prior to such transfer, Respondent shall notify the EPA at the address specified in paragraph 33 of this Consent Order.

IV. STATEMENT OF PARTIES

The following FINDINGS OF FACT AND OF VIOLATION are made solely by the EPA. In signing this Consent Order, Respondent neither admits nor denies the FINDINGS OF FACT AND OF VIOLATION. As such, and without any admission of liability, Respondent consents to issuance of this Consent Order and agrees to abide by all of the conditions herein. Respondent waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondent may have with respect to any issue of fact or law set forth in this Consent Order, including, but not limited to, any right of judicial review of this section 309(a)(3) Consent Order under the Administrative Procedure Act, 5 U.S.C. §§ 701-708. Respondent further agrees not to challenge the jurisdiction of the EPA or the FINDINGS OF FACT AND OF VIOLATION below in any proceeding to enforce this Consent Order or in any action under this Consent Order.

V. FINDINGS OF FACT AND OF VIOLATION

1. Respondent BIP 40, LLC, is and was at all times relevant to the Consent Order a corporation organized under the laws of the State of Wyoming. Respondent maintains its principal office at 1300 Venture Way, Casper, Wyoming.

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2. In October of 2011, Respondent began work to acquire a 117-acre parcel for the purposes of developing an RV park at the Site.
3. Respondent retained SBL Associates, Inc. (SBL), a civil engineering firm, to prepare a grading and improvement plan. In July of 2012, grading of the commenced. All mass grading was completed sometime in September or October of 2012.
4. Respondent states that during the grading process, SBL informed Respondent that an area in the northeast portion of the property likely contained jurisdictional wetlands and that this area was the only area on the property containing jurisdictional wetlands. Respondent prohibited contractors from placing fill in this portion of the property.
5. On March 13, 2013, SBL informed Respondent that the northwest portion of the property, which had already been impacted by grading activities, was possibly a wetland.
6. Respondent engaged a consulting firm, Carlson McCain, Inc. (Carlson McCain), to conduct a site investigation and wetland delineation of the Site.
7. As demonstrated by the wetland delineation report produced by Carlson McCain, construction activities at the Site impacted approximately 4.5 wetland acres of a former oxbow/meander channel of Camp Creek and that fill material approximately 10 to 15 feet in depth was placed on the wetland area. Wetland functions have also been eliminated.
8. The impacted wetlands at the Site are adjacent to and directly abut Camp Creek, and are hydrologically connected to Camp Creek. Camp Creek is a tributary to the Little Muddy River, which is a tributary to the Missouri River, a traditional navigable water.
9. The wetlands adjacent to and abutting Camp Creek, referenced in paragraphs 7 and 8 of this Consent Order, are and were at all relevant times "waters of the United States" within the meaning of

33 C.F.R. § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

10. The discharges of fill material described in paragraph 3 of this Consent Order resulted from the use of common earthmoving vehicles and equipment, which were operated by Respondent or persons acting on its behalf.
11. Respondent is a “person” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
12. The discharged dredged and/or fill material referenced in paragraph 3 of this Consent Order is and was at all relevant times “dredged material” and “fill material” within the meaning of 33 C.F.R. § 323.2(c) and (e), respectively, and “pollutants” within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
13. The vehicles and equipment referenced in paragraph 10 of this Consent Order are and were at all relevant times each a “point source” within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).
14. The placement of dredged and/or fill material into wetlands adjacent to and abutting Camp Creek constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).
15. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.
16. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.

17. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.
18. Respondent was not authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraph 3 of this Consent Order.
19. The activities conducted by Respondent and its agents as described in paragraph 3 of this Consent Order violate section 301 of the CWA, 33 U.S.C. § 1311.
20. Activities to be carried out under this Consent Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). Restoration is appropriate and required to address the actual and potential harm to water quality, aquatic habitat, and wildlife habitat, as well as other functions and values, caused by Respondent's unpermitted activities. OK
21. These preceding FINDINGS OF FACT AND OF VIOLATION and the ORDER FOR COMPLIANCE below have been made after consultation and coordination with the Corps' Omaha District.

VI. ORDER FOR COMPLIANCE

Based upon the foregoing FINDINGS OF FACT AND OF VIOLATION and pursuant to the authority vested in the Administrator of the EPA under CWA sections 308 and 309(a), 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, it is hereby ORDERED and AGREED:

25. Respondent shall immediately terminate all discharges of dredged and fill material at the Site, now and in the future, into waters of the United States unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes

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all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in the discharge of dredged or fill material into waters of the United States.

26. Respondent shall conduct removal and restoration activities for impacts to waters of the United States resulting from the unauthorized discharges of dredged and/or fill material at the Site in accordance with the schedule and other requirements set forth in the Wetland Restoration Plan (Plan) appended herein as Attachment A.
27. This Consent Order is not a permit or an authorization to discharge dredged or fill material, storm water, or any other pollutant into waters of the United States. Respondent shall consult with the Corps and the North Dakota Department of Health (NDDH) at the addresses and telephone numbers below to determine if any work to be performed pursuant to this Consent Order requires a permit from the Corps under section 404 of the CWA, 33 U.S.C. § 1344, or from NDDH under section 402 of the CWA, 33 U.S.C. § 1342. If any such permit is required, Respondent shall obtain such permit(s) and provide a copy or copies to the EPA pursuant to paragraphs 28 and 33 of this Consent Order prior to initiating any work that is to be performed pursuant to this Consent Order.

U.S. Army Corps of Engineers
North Dakota Regional Office
1513 S. 12th Street
Bismarck, ND 58504
Telephone: 701-255-0015

North Dakota Department of Health
Division of Water Quality
918 East Divide Avenue, 4th Floor
Bismarck, ND 58501-1947
Telephone: 701-328-5210

28. Respondent must make a timely application for each permit necessary to implement the Plan and for conducting removal and restoration activities in accordance with the Plan, including the schedule

specified therein, with all granted permits, and with all applicable laws. If any permits are necessary, Respondent shall demonstrate that all permits have been granted by providing copies of all such permits, and any amendments thereto, to the EPA within seven calendar days of issuance of each permit.

29. In addition to the notification requirements set forth in paragraph 27 of this Consent Order, after issuance of any Corps authorization for removal and restoration work, Respondent shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

30. All removal and restoration activities conducted pursuant to the Plan and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in wetland restoration. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to the EPA within 14 calendar days of the effective date of this Consent Order and prior to commencement of removal and restoration activities.

31. Respondent shall implement the Plan and then commence all removal and restoration activities in accordance with the Plan, including the time frames specified therein, and all granted permits.

32. Carlson McCain, ~~LLC~~ or GeoMap, LLC shall supervise all work performed pursuant to the Plan and shall be present at the Site during all critical times unless otherwise approved in advance by the EPA.

OK
Deleted: The proposed consultant referenced in paragraph 10.6 of this Consent Order

33. Respondent shall submit two copies of the Plan, all permits, notifications, and related correspondence to:

Monica Heimdal, 8ENF-W
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop St.
Denver, CO 80202-1129
Telephone: 303-312-6359

A copy of the Plan also shall be provided to the Corps at the address noted in paragraph 27 of this Consent Order.

34. All plans, deliverables, reports, specifications, schedules, and attachments required by this Consent Order are, upon approval by the EPA, incorporated into this Consent Order. Any noncompliance with such EPA-approved plans, deliverables, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Consent Order and subject to EPA enforcement.
35. A lease, sublease, or transfer of the Site shall not relieve Respondent, its officers, directors, agents, successors, and assigns of any responsibility in the Consent Order unless the EPA, Respondent, and the lessee, sublessee, or transferee agree in writing to allow the lessee, sublessee, or transferee to assume such responsibility. Additionally, at least 30 calendar days prior to such lease, sublease, or transfer, Respondent shall notify the EPA regarding the details of the lease, sublease, or transfer at the address specified in paragraph 33 of this Consent Order.
36. Respondent shall allow, or use its best efforts to allow, access by any authorized representative of the EPA or its contractors, the Corps, the NDDH, the North Dakota Game and Fish Department, the Natural Resources Conservation Service, and the U.S. Fish and Wildlife Service, upon proper presentation of credentials, to the Site and to all records relevant to this Consent Order for any of the following purposes:
 - a. To inspect and monitor progress of the activities required by this Consent Order;
 - b. To inspect and monitor compliance with this Consent Order; and
 - c. To verify and evaluate data and other information submitted to the EPA.
37. This Consent Order shall in no way limit or otherwise affect the EPA's authority, or the authority of any other governmental agency, to enter the Site, conduct inspections, have access to records, issue

notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

38. This Consent Order shall be effective upon the date Respondent receives a fully executed copy of this Consent Order.

39. Issuance of this Consent Order shall not be deemed an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to this Consent Order.

40. The EPA agrees to submit all notifications and correspondence related to the Consent Order to:

Mr. Christopher H. Hughes

Member

BIP 40, LLC

1569 Highway 15 South Bypass

Louisville, MS 39339

Deleted: Firstname Lastname

Deleted: Title

Deleted: P.O. Box 51568

Deleted: Casper, WY 82605

Mr. Kyle Brock

GEOMAP, LLC

6602 E. Lone Mountain Road N.

Cave Creek, AZ 85331

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Mr. John A. Brunini

Counsel for Respondent

Brunini, Grantham, Grower & Hewes, PLLC

The Pinnacle Building, Suite 100

190 East Capitol Street

Jackson, MS 39201

41. Any party hereto may, by notice, change the address to which future notices shall be sent or the identities of the persons designated to receive notices hereunder.

42. If an event causes or may cause delay in the achievement of the requirements of this Consent Order, Respondent shall notify the EPA by telephone or via e-mail as soon as possible and in writing within ten working days from the date Respondent first knew of such event or should have known of such event by exercise of due diligence, whichever is earlier. Respondent's written notice shall specify the

length of the anticipated delay, the cause(s) of the delay, the measures taken or to be taken by Respondent to minimize the delay and a timetable by which those measures will be or have been implemented. Notification to the EPA pursuant to this paragraph of any anticipated delay, by itself, shall not excuse the delay or the obligation of Respondent to comply with requirements and deadlines of this Consent Order, unless the EPA grants in writing an extension of the applicable requirement or deadline.

43. If Respondent demonstrates to the EPA's satisfaction that the delay or anticipated delay has been or will be entirely caused by circumstances beyond Respondent's control (or the control of any of Respondent's agents) that Respondent could not have foreseen and prevented despite due diligence, and that Respondent has taken all reasonable measures to prevent or minimize such delay, the EPA may excuse performance or extend the time for performance of such requirement for a period not to exceed the actual delay resulting from such circumstances. The EPA's determination on these matters shall be made as soon as possible and in writing within ten working days after the receipt of Respondent's written notification of the event. The parties agree that changed economic circumstances shall not be considered circumstances beyond the control of Respondent.
44. Respondent understands and acknowledges the following:
- a. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), as adjusted for inflation by 40 C.F.R. part 19, authorizes civil penalties of up to \$37,500 per day for each violation of an order issued by the EPA under section 309 of the CWA, 33 U.S.C. § 1319.
 - b. Compliance with the terms and conditions of this Consent Order shall not be construed to relieve Respondent of its obligations to comply with any applicable Federal, state, or local law or regulation.

c. Failure by Respondent to complete the tasks described herein in the manner and time frame specified pursuant to this Consent Order may subject Respondent to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Consent Order.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8
Complainant

Date

Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

BIP 40, LLC
Respondent

Date

Vern Haugen
Managing Member
BIP 40, LLC

Deleted: Firstname Lastname

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EXHIBIT A

01635389